

ONTARIO COURT OF JUSTICE

CITATION:

DATE: 2014-02-03

COURT FILE No.: Municipality of Chatham-Kent 260,261,262/13

B E T W E E N :

CHATHAM-KENT CHILDREN'S SERVICES

Applicant

— AND —

A. H. and E. H.

E. K. and R. K.

J. S. and S. T.

Respondents

Before Justice Stephen J. Fuerth

Heard on January 10, 2014

Reasons for Judgment released on February 3, 2014

L. Hodgson-Harris counsel for the applicant
C. Knowles counsel for the respondents A.H., E.H., E.K., J.S. and S.T.
G. Wong counsel for the Office of the Children's Lawyer,
legal representative for the child, R.K.

Fuerth, J.:

[1] This was an application by Chatham-Kent Children's Services, ("the Society") for an Order under section 40 of the Children's Law Reform Act authorizing it to deliver the children in this proceeding to the child protection authorities in the Province of Quebec.

[2] The respondents were the parents of the children who were the subject of a court order in Quebec that would place the children in the temporary or provisional

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custody of the child welfare authorities.

[3] The children were as follows:

1. The children of A.H. and E.H., were R.(H.)K., born Nov. 27th, 1996, Y.H., born Jan. 22, 1999, T.H., born Aug. 1, 2000, S.H., born Aug. 10 or Oct. 10, 2002, and M.Y.H., born May 17, 2004;
2. The child of E.K and R.(H.)K., was B.F.K., born Sept. 14, 2013;
3. The children of J.S. and S.T., were Y.N.S., born Dec. 14, 1997, M.S., born Jan. 4, 1999, Y.S., born Jan. 21, 2000, M.S., born July 29, 2001, Y.S. born Jan. 1, 2004, R.S., born June 16, 2005, C.E.S., Feb. 2, 2009, and M.S., born April 14, 2013.

[4] The Respondents lived in Quebec with their children for a number of years as part of a community known as Lev Tahor located in Ste-Agathe-des-Monts, within the territorial jurisdiction of the child welfare authority known as Centre Jeunesse des Laurentides, hereinafter referred to as the Quebec agency.

[5] The Quebec agency had been investigating the families within the community based upon concerns about the welfare of the children for a period of about 18 months prior to the commencement of proceedings under the Youth Protection Act on November 14th, 2013.

[6] The protection concerns included the forced marriage of children under 16 years of age, the failure to provide adequate education for the children, inappropriate discipline of children by use of force, and neglect of the parents in the physical care of the children.

[7] On November 14th, 2013, the Quebec Agency commenced a proceeding based upon the investigation as set out above. Their workers gave oral notice on November 14th of the proceeding, and advised some of the parents that the matter would be in Court the following Tuesday, November 19th, when their presence would be required. They further advised the parents that workers would return on November 18th to explain the process.

[8] When the workers returned to the community on Monday, November 18th, the parents and the children had left, along with most of the members of the community. The finding of the Court of Quebec, which was confirmed in the evidence before me, was that the children were removed from the province of Quebec in the early hours of the morning of November 18th, 2013. They moved to Ontario, and ultimately settled in Chatham-Kent some days later.

[9] On November 19th, 2013, the matter was before the Court of Quebec. The parents A.H. and J.S. attended along with their legal counsel before Justice Michel Jasmin. Justice Jasmin postponed the case to November 20th, and ordered the par-

ents to ensure the children would be present at the hearing. He also appointed counsel for the children.

[10] On November 20th, the parents A.H. and J.S. attended the hearing with counsel, but did not present the children despite the order of Justice Jasmin. In fact, as disclosed by the decision of Justice Hamel dated November 22nd, they testified that they did not intend to present the children as ordered as they were concerned that custody of the children would be removed from them. They would not do as ordered unless they had the assurance of the Court that their children would not be taken from them.

[11] Reading the decision of Justice Hamel dated November 22nd, 2013, it was apparent that the two fathers gave evidence, as did a representative of the Quebec Agency. The fathers disclosed that the departure to Ontario had been planned for some time, but in fact took place after buses were leased on November 15th, 2013.

[12] It was clear on the face of the decision of Justice Hamel of November 22nd, that the parents had objected to the jurisdiction of the Court of Quebec on the basis that the children no longer resided in Quebec, and had in fact taken up residence in Ontario. Justice Hamel clearly disagreed, and found that the community had fled with the children in order to evade the judicial process that had begun. He made a finding that at the time of the proceeding, the families domicile was in fact in Ste.-Agathe.

[13] Justice Hamel also made it clear that his decision was not a finding that the allegations had been proven. He determined that the Court of Quebec had jurisdiction, and in view of the removal of the children, he declared that the children's rights had been violated, ordered that the information before the Court be disseminated to child protection agencies throughout Canada to ensure their protection and appearance before the Court, directed that the children be present at the hearing which he scheduled on November 27th, 2013.

[14] On November 27th, 2013, Justice Hamel conducted a hearing. Neither the parents nor the children attended, although counsel for the parents and the children were present. Justice Hamel heard evidence, and made an order that the children be placed in foster care for the prescribed period of 30 days, with a further order that the children receive a medical examination and such emergency psychological help as they needed. He further ordered that such contact between the parents and the children take place as determined by the Director of the Quebec agency.

[15] The applications before me were commenced on December 11th, 2013 by the Society seeking to enforce the Order of Justice Hamel.

[16] The application raised a number of issues to be considered.

1. Does this court have jurisdiction to grant the relief sought under section 40 of the Children's Law Reform Act?

2. Does the Society have standing to bring this application under the Children's Law Reform Act?
3. Where was the habitual residence of the children at the time of the application in Quebec?
4. Should the Court recognize the Quebec Order, and make an order accordingly?
5. Was there an infringement of the Charter of Rights, and if so, what remedy was appropriate.

[17] This was not an application under the Child and Family Services Act. The Court was not called upon to assess the risks to the children, or the merits of the proposed application pending in Quebec. The application before this Court was one of jurisdiction, and whether the Order of the Court of Quebec ought to be recognized.

[18] It was common ground that there was no provision in the Child and Family Services Act that provided for the recognition or enforcement of an Order made in a child protection proceeding in another province.

[19] It was also conceded, and properly so, that this Court had no *parens patriae* jurisdiction in the event that there was a legislative gap in terms of jurisdiction.

[20] The Ontario Court of Justice was a court of competent jurisdiction for applications under the Children's Law Reform Act. "Court" was defined under Part III of the Act as including the Ontario Court of Justice.

[21] Section 19 of the Children's Law Reform Act sets out the purposes of Part III of the Act. It promoted the policy that applications regarding custody of children be determined on the basis of the best interests of children. It discouraged Ontario courts from exercising concurrent jurisdiction in matters of custody where another provincial tribunal had a closer connection to the child. It further discouraged the abduction of children as an alternative to the determination of custodial rights by due process. It unequivocally stated the purpose was to provide more effective enforcement of custody orders and recognition of custody orders made outside Ontario.

[22] Section 22 of the Children's Law Reform Act set clear parameters concerning the jurisdiction of Ontario Courts in matters of custody. Section 22 provided a limitation on the Ontario courts in the exercise of jurisdiction over custody, having regard to the habitual residence of the child, or in cases where a consideration of a number of factors might cause an Ontario Court to accept jurisdiction.

[23] Section 40 and 41 of the Children's Law Reform Act pertain to the recognition of extra provincial orders. Section 41 created an obligation on an Ontario Court

to recognize an extra provincial order unless satisfied that one or more of five criteria have been met.

[24] It was clear reading the Children's Law Reform Act, and in particular sections 19, 22, 40 and 41 together, that the touchstone for jurisdiction of the Ontario Court was the habitual residence of the child or children at the time of the application.

[25] The reasons for this approach to jurisdiction as a matter of policy were clearly enunciated in Section 19.

[26] In this case, all of the evidence concerning the welfare of the children was located in Quebec. There was an extensive investigation over 18 months that lead to the commencement of the proceedings. It would be impractical at best, and potentially harmful at worst, if the Society were now required, in the context of the need to protect the children, to conduct a separate and new investigation into all of the issues currently before the Court of Quebec, and take the initiative to bring the matter before the Courts, simply because the parents have decided as a tactical manoeuvre to absent themselves from Quebec in order to frustrate the process of justice that had started. I said harmful to the children having regard to the seriousness of alleged concerns and the potential for harm by reason of the delay.

[27] Section 41 clearly required an Ontario Court to recognize an extra-provincial order, unless this court was satisfied that one of the criteria under section 41 (1) was not met.

Section 41 (1) (a)

[28] The respondents were given oral notice of the proceeding in Quebec on November 14th. The concept of notice requirements under child welfare legislation was addressed by the Court of Quebec on November 19th and again on November 22nd. The parents were present with counsel, and raised objections to the jurisdiction, and attorned to the jurisdiction of Quebec for that purpose. The Court of Quebec decided that the notice was in keeping with the requirements under the legislation in Quebec. I was also advised during argument by counsel for the parents that the Order was under appeal.

[29] There was an attempt in this proceeding to demonstrate that the decision to move to Ontario was bona fide, and that an intention to do so had been formed prior to the commencement of proceedings on November 14th.

[30] Notwithstanding that attempt, I saw no reason to come to any conclusion different than that arrived at by Justice Hamel on November 22nd. The community did not move. It fled in haste in the face of a proceeding that the community perceived to be placing its children at risk of apprehension by the Quebec agency. This fact confirmed that the parents had effective notice of the commencement of proceedings, and reacted accordingly.

Section 41 (1)(b)

[31] The Respondents were given an opportunity to be heard in the Court of Quebec before the Order was made. The decisions of the Court of Quebec clearly reflected that Mr. S. and Mr. H. both appeared in person on the 19th of November, and spoke to the presiding judge. At the same time, the parents were represented by counsel in the Quebec proceedings. They were ordered to appear together with the children who were the subject to the proceeding on November 20th. They attended with counsel, but refused to produce the children. They were again ordered to attend for a hearing on November 27th with the children, and chose not to. Their counsel appeared on November 27th on their behalf.

Section 41 (1)(c)

[32] I had no evidence before me that the Quebec law did not require the Court to consider the best interests of the children before the Court, and the onus in that regard rested on the Respondents in this case.

[33] When I read Justice Hamel's decisions, both on November 22nd, and after the hearing on November 27th, his concern for the welfare of the children was clearly expressed, and the best interests of the children were foremost in his decisions when he made the orders he did.

Section 41 (1)(d)

[34] The Order made was not contrary to public policy in Ontario. The Child and Family Services Act required a court to conduct an early hearing following an apprehension and in doing so consider the appropriate placement of children at an early stage based upon a number of criteria. Public policy in Ontario required that the interests and protection of children be maintained, and in doing so, further requires judicial oversight of any efforts to protect children that might be undertaken by child welfare authorities. Having read the decision of Justice Hamel, I was satisfied that what was done in conducting the hearing, and making the Order he did, was in keeping with public policy in Ontario.

Section 41 (1)(e)

[35] Finally, I must be satisfied that the Court of Quebec had jurisdiction, based upon a determination of "habitual residence" of the children at the time the proceeding commenced, i.e., November 14th, 2013.

[36] Having read the evidence filed in this proceeding, and the reasons given by Justice Hamel, I concluded that on November 14th, 2013, the effective date of the commencement of the proceedings in Quebec, the children were habitually resident in Quebec.

[37] There was no evidence presented to me that established any conclusion

other than the one reached by Justice Hamel. Intention to change location did not equate to a change in habitual residence. The manner and haste of the exit to Ontario and temporary accommodations in motels, together with the timing of the substantial move, leaving behind personal possessions, were more consistent with flight than an orderly and planned move.

[38] I reviewed the affidavit filed in this proceeding of U.G., N.H. and M.R., acting as community organizers for the Lev Tahor community. It was significant to note the following evidence offered in their affidavit dated Dec. 16th, 2013.

[39] At paragraph 26, they said "We felt it necessary to have a contingency plan in the event that the Quebec government would initiate action such as the apprehension of our children".

[40] At paragraph 32, "subsequent to the meeting with the DYP, (*my note, in reference to the November 14th meeting with the workers of the Quebec agency*), there were discussions among members of the community and ultimately an agreement between all members of the community to put into action the contingency plan we had been preparing for the previous six months."

[41] At paragraph 33, "we immediately took steps to put our contingency plan into action and organized the community to move from Quebec to Ontario..."

[42] Also attached was a copy of a tenancy agreement for housing in Chatham dated November 18th, 2013 for J.S. and S.T.

[43] It was my conclusion that the triggering event was the filing of the application on November 14th. While there may have been some plans being formulated for a move, at the time of the application the Respondents and their children remained habitually resident in Quebec. The affidavit noted above confirmed that the decision to move was made after notice was given on November 14th. It was also clear that such action was directly attributable to the possible apprehension of children in Quebec. No other conclusion was possible. At the time of notice and commencement of the Quebec proceedings, November 14th, the children were habitually resident in Quebec, and the move was fueled by the fear of apprehension of the children.

[44] In any event, the argument was a transparent attempt to have this court overrule Justice Hamel on the issue of the jurisdiction of the Court of Quebec, an issue already addressed by the Court of Quebec, and which the Respondents advised they have appealed.

[45] The language of section 41 was mandatory, that is the Ontario Court shall recognize the extra-provincial order unless satisfied that one of the exclusions in section 41 (1) was met. There were no such exclusions in this case, and it was necessary therefore to recognize the order of the Court of Quebec.

[46] It was submitted that the Children's Law Reform Act was limited in application to applications by natural persons. With the greatest respect I disagree. Had the legislature sought to limit applications to natural persons, they would have said so in the clearest of language. For example, "parent" is often used in legislation to denote a certain class of natural persons, by way of relationship to the child, such as "mother" or "father". Persons who are described in this way that is by way of relationship through blood or marriage are intended to mean natural persons.

[47] In this case, "person" had the meaning intended by the Legislature as reflected in the Legislation Act, to include corporations. The term was not otherwise defined in the Children's Law Reform Act. An examination of section 46 of the Children's Law Reform Act, i.e. the Hague Convention section, clearly contemplated the return of children into the care of "institutions". Reading Part III as a whole, the purpose of the Act was clearly intended to provide a legislative framework for the recognition of an extra-provincial order and to recognize the jurisdiction of that extra-provincial court based upon the consideration of the habitual residence of the children who had been removed. If after judicial review, it was determined that the extra-provincial order ought to be recognized (and section 41 of the Children's Law Reform Act was mandatory in that regard), effect should be given to the Order.

[48] "Custody" ought to be interpreted broadly and liberally, and will include orders for temporary or provisional care in favour of child welfare authorities. In this respect, the law of Ontario clearly recognized that Societies can be custodians of children, and be charged with the responsibilities associated with the obligation.

[49] In this case, the Quebec agency was awarded custody of the children under a provisional order. The order clearly required the children be placed in care. In this case, the corporate entity, i.e. the Quebec agency, was awarded custody of the children.

[50] The Society acted as agent for the Quebec agency. The Society was authorized as a children's aid society under the Child and Family Services Act. Its powers were set out in section 15 of the Act. It had the responsibility for the protection and welfare of children within its territorial jurisdiction, that is, the Municipality of Chatham-Kent.

[51] How does one enforce an order for custody made in another province for children found in Ontario? This issue was fully canvassed by Justice Carruthers in *Re Bonczuk and Bourassa*, (1986), 55 O.R. (2d) 696. In that case, the police had taken custody of a child who was the subject of a Quebec Superior Court order. Justice Carruthers reviewed the requirement for judicial review and sanction of an extra-provincial custody order as the appropriate and necessary process to be adopted in cases involving enforcement of the order.

[52] Justice Carruthers reviewed the applicable sections in Part III, and concluded that in Ontario, enforcement of extra-provincial Orders required as a matter

of law judicial review of the circumstances before such Order would be enforced.

[53] In this case, an application under the Children's Law Reform Act was the only vehicle available for the enforcement of the order. In my view, this procedure ensured that the removal of a child from the province of Ontario was lawful and in keeping with the proper administration of law. There was no gap in the legislative scheme, in that Part III of the Children's Law Reform Act provided a comprehensive code for such applications.

[54] The Divisional Court of Ontario had occasion to review a similar process having regard to the apprehension of a child who was the subject of child welfare proceedings in Ottawa and who was apprehended with the assistance of the child welfare authorities in Quebec. The court determined that the process was a legal act, and a practical solution for cases involving children who were moving across provincial boundaries. *Children's Aid Society of Ottawa v. L.(I.)*, 2012 CarsellOnt 9930, 2012 ONSC 2808.

[55] In the instant case, we have the corollary occurring, that is, children who were the subject matter of a child welfare Order in Quebec, who were removed to Ontario. The Quebec agency was seeking the assistance of the Society in enforcement of the Order.

[56] The clear legislative intent in such cases was that an application be made to the Ontario Court pursuant to Part III of the Children's Law Reform Act, and in particular sections 40 and 41.

[57] The Quebec agency had no jurisdiction to find or apprehend children outside of its territorial jurisdiction, such as in this case, in Ontario. It required the assistance of the Society, which had jurisdiction in Chatham-Kent where the children were located. It was also a requirement of law in Ontario, as provided in section 40 and 41 that such process be the subject of judicial recognition and order.

[58] The Quebec agency would not have standing to commence an application outside of its territorial jurisdiction. Such a legal proceeding would be ultra vires its powers and the extent of its lawful authority. It required the assistance of a properly constituted entity within Ontario to make an application seeking enforcement of the Order on its behalf.

[59] As decided by the Divisional Court in the CAS of Ottawa case, who would be better to do so than the duly authorized child protection authority within Ontario, in this case the Society, in much the same manner as approved in that case when the Ottawa CAS was aided by a Quebec agency. This was clearly a practical approach to the exigencies of this case.

[60] Recognizing the authority of the Society to bring this application was not a matter requiring the exercise of *parens patriae* power in order for this court to find jurisdiction. As I have already said, the Children's Law Reform Act clearly conferred

jurisdiction on this Court to hear the application and to recognize the extra-provincial order if the criteria under the Act were satisfied.

[61] The recognition of the Society's standing in this case flowed from their statutory responsibilities for the protection and welfare of children within its territorial jurisdiction. In my view, this was not a jurisdictional issue, as the Court clearly had jurisdiction. Rather this was a procedural issue, having to do with how justice might be effectively administered in this case.

[62] Section 146 of the Courts of Justice Act empowered this Court to exercise its jurisdiction, clearly conferred on it under Part III of the Children's Law Reform Act, in any manner consistent with the due administration of justice. The due administration of justice in circumstances such as these was ruled upon by the Divisional Court. Recognition of the standing of the Society was a practical approach in the face of these unusual circumstances.

[63] I concluded that the Society had jurisdiction to act as it did as agent for the Quebec agency as a party to an application under the Children's Law Reform Act.

[64] The Respondents gave notice of a constitutional question under the Charter of Rights and Freedoms. Notice was given to the Attorney General of Ontario, and of Canada, and neither took part in this proceeding.

[65] The Respondents contended a breach of freedoms under section 2, 6 and 7 of the Charter.

[66] Much of the application was based upon an argument that the Ontario Court of Justice had no jurisdiction to hear the application, other than perhaps by reason of the exercise of a *parens patriae* power. I have ruled that the Ontario Court of Justice was expressly conferred jurisdiction by the Children's Law Reform Act, and the argument presented on that basis must fail.

[67] The argument concerning alleged breaches of freedom of religion, freedom of movement and the right to life, liberty and the security of person, and not to be deprived thereof except in accordance with the principles of fundamental justice, were bound up in the proceedings occurring under the Youth Protection Act in Quebec. The Respondents were able to raise these very issues in the Court which properly had jurisdiction to address these matters based upon the finding of habitual residence in Quebec. It was clear in reading Justice Hamel's decisions that he was cognizant of the liberties of the Respondents. The arguments about alleged breaches under the Charter of Rights ought to be presented to the Court having jurisdiction, which I have determined to be the Court of Quebec.

[68] Secondly, the rights which the Respondents sought to protect were subject to the balancing of those rights as against the rights of the children themselves to protection from harm, an issue in which society as a whole has an interest. The application under section 40 of the Children's Law Reform Act was a proceeding in ac-

cordance with principles of fundamental justice, and did not infringe on those rights. I would not have entertained this application on an ex parte basis, as the Respondents had the constitutional right not to be deprived of any Charter right except in accordance with principles of fundamental justice. Similarly I was concerned that the mother R.(H.)K. be represented in this proceeding, and appointed counsel for her.

[69] Thirdly, the Respondents raised the specter of a denial of freedoms by reason of proposed legislation in Quebec that would limit freedoms guaranteed under the Charter of Rights. The Quebec legislation had not been passed, and the argument was without substance. Even if it were the law of Quebec, the Charter of Rights and Freedoms had general application everywhere in Canada, and was available to the Respondents in the Quebec courts as it would be in any other jurisdiction in Canada.

[70] For these reasons the provisions of Part III of the Children's Law Reform Act are constitutional, and I would dismiss the Respondents' motion in that regard.

[71] In summary, the Ontario Court of Justice had jurisdiction to hear applications under the Children's Law Reform Act. The children who were the subject matter of the proceedings in Quebec were habitually resident in Quebec at the time proceedings were commenced there. An order of custody was made by the Quebec court concerning the children, ordering the children into the provisional (foster) care of the Quebec agency. The Ontario Court of Justice was required to recognize the Quebec court order. The policy reasons for the legislative scheme were to avoid multiplicity of proceedings between jurisdictions involving custody of children, and discourage the abduction of children in the face of lawful orders made by the jurisdiction where children were habitually resident. To do otherwise would simply encourage jurisdictional chaos as others try to escape the lawful processes where children habitually reside. In this case there was no applicable exception not to enforce the Quebec order.

[72] The Respondents raised in argument an issue as to the serious harm that would be occasioned to these children by reason of an apprehension. A serious risk of harm was one of the factors than an Ontario Court might consider under section 23 to exercise jurisdiction and to make an Order.

[73] Apprehension of children by state authorities has the potential for psychological harm. It is often weighed by the Court having jurisdiction. In this case, Justice Hamel addressed the potential by putting in place orders that were intended to ameliorate the potential harm.

[74] The unilateral actions of the Respondents to flee from Quebec placed these children at further risk of harm, and could not be construed as concern for the interests of their children. Justice Hamel clearly identified this as part of his decision. Given that Justice Hamel recognized the potential for the impact upon the children, and put in place measures to address the potential harm of the apprehension, I did

not accept that there was a serious risk of harm such that I needed to assume jurisdiction over the children under section 23.

[75] It was conceded during argument that the Court ought not to make an order requiring the child R.(H.)K., who was a parent in one file, and a child in another, in view of her age. I accepted that position as consistent with the law of Ontario.

[76] More difficult was what order I should make with respect to her child, B.F.K. I was assured on the evidence that the child welfare authorities will make every accommodation with respect to this infant's needs, including access by her mother, and accordingly my Order will include the infant.

[77] As a consequence therefore, I am ordering that the Society deliver the children, with the exception of R.(H.)K., to the Quebec agency and take such control of the children as is necessary to effect the return of the children to Quebec in keeping with the order of Justice Hamel dated November 27, 2013, with such assistance as they may require from the Chatham-Kent Police Service, or the Ontario Provincial Police. Until that occurs, the children shall not be removed from the Municipality of Chatham-Kent.

[78] Pursuant to Rule 63 of the Ontario Rules of Civil Procedure, I am directing a stay of this order, to permit the Respondents to file an appeal of this Order. By operation of Rule 63, the stay expires upon the expiry of the time limited for an appeal, which in this case would be 30 days. As a condition of the stay, the Society is authorized to attend at the residences of the children on an announced and unannounced basis and to have independent access to the children as it sees fit. The purpose of this condition is to confirm the presence of the children in Chatham-Kent as required by this order and to assess their state of health and well-being.

Released: February 3rd, 2014

Signed: "Justice Stephen J. Fuerth"